

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of

Second Periodic Review of the
Commission's Rules and Policies
Affecting the Conversion
To Digital Television

MB Docket No. 03-15

COMMENTS OF CHRIS LLANA

As an strong advocate of DTV consumer education, I felt somewhat ambivalent when March 1 arrived. Happy that analog-only TVs could no longer be imported or transported across state lines, but sad that millions of those arguably already-obsolete TVs had already been taken home by unsuspecting consumers.

To celebrate that day, I did the circuit of my local big-box TV stores, surveying their supply of analog wares (the smaller than 25" variety, the last range to fall under the analog ban). What I found was pretty much the same as what was available ten years ago.

A month later, on April 1, I did the tour again, hoping for change but not expecting much. To my surprise, Best Buy had mostly cleared out their analog-only boxes in favor of new models with digital tuners, including many digital CRT TVs.

The shelves at Circuit City and Sears, however, were still lined with rows of small analog-only TVs, and virtually no inexpensive digital CRT models.

On May 1, six days after the FCC announced its new "Consumer Alert" labeling requirement for analog-only TVs, I did my two-months-after-the-analog-ban store survey. Were supplies still holding out?

Sears' analog-only inventory seemed unchanged: 20+ analog models on display, digital CRTs nowhere to be found, and no warning labels or consumer alerts.

Circuit City had reduced their model count of analog-only TVs from about 35 on April 1, to 20 or so on May 1. No warning labels or consumer alerts.

Best Buy was good on April 1. But on May 1 they still had a handful of small analog sets, mostly LCDs, and no warning labels or consumer alerts anywhere.

Wal-Mart had both digital and analog small TVs for sale, mostly CRTs. They *did have* the new FCC-mandated consumer alert label just below each analog TV.

I noticed the same thing with amazon.com's analog-only TV listings, which included the FCC-mandated consumer alerts.

So there was prompt compliance by at least two very large retailers with the FCC's new labeling requirement, announced less than a week before my visits. What happened to Circuit City, Best Buy, and Sears?

The FCC announced the labeling requirement at its April 25 Open Meeting; no specific mention of the effective date was made at that time. The press release also made no mention of a specific effective date.

While ordinarily publication of a regulation is followed by a period of time before the effective date, making a requirement effective immediately does happen. In this case, time was of the essence.

The import and transportation across state lines of analog-only TVs had been banned as of March 1. Stores were allowed to sell those sets from remaining stock. If a lengthy delay in effective date had been specified, all of those obsolete analog-only TVs would have been purchased by unsuspecting consumers.

Any positive benefit that could have been derived from the labeling requirement would have been negated by any delay in the effective date. There would have been no point in implementing the requirement in the first place.

While the industry has argued that those analog TVs can be used for other purposes, and can be used in conjunction with separate converter boxes, those limitations cannot be said to be understood by the consumer today when he or she buys an analog-only TV (without specific notice of the impending end to the DTV transition).

In particular, there is no way for the consumer to avoid the compromised loss of picture integrity inherent in an analog-only TV's narrowscreen 4:3 display. Either the converted digital picture will have black bars top and bottom, or will have its right and left sides lopped off.

The labeling Order was released May 3. Paragraph 14 makes clear (to me, at least) that the requirement was being made effective immediately, for both brick-and-mortar retailers and internet retailers. To wit, if you extract the critical language:

"We require that anyone that sells or offers for sale or rent television receiving equipment that does not contain a DTV tuner *after March 1, 2007* must display the following consumer alert. . .

and

Any persons [that] "display or offer for sale or rent via direct mail, catalog, or electronic means (e.g., the Internet) analog-only television receiving equipment after March 1, 2007, ... must prominently display . . .

Obviously the Order could not be enforced for non-compliance before the date it was released, but one might think that Wal-Mart and Amazon.com understood the requirement to be immediate, given their prompt compliance.

Strangely, I'm now hearing through the grapevine that the effective date of this labeling requirement has now been tentatively set for May 25, subject to OMB approval. Why the apparent belated change?

Given the total lack of information in the public record to explain this reported regulatory action, I must resort to reading the tea leaves.

We know that representatives of CERC had a number of meetings and telephone conferences with FCC officials on April 12 and 13 (all concerning the FCC's proposed labeling requirement). In these discussions the industry apparently argued against immediate application of the requirement, or if you prefer, expressed support for a delay in application.

The specific language of the proposed consumer alert label was not at issue, having already been part of an industry-vetted legislative proposal (S.2686).

CERC argued for a "feasible" or "reasonable" time for implementation after the language had been made public (even though they had supposedly been prepared to implement a voluntary labeling program for the past year).

What is feasible? Wal-Mart and Amazon.com complied within days of the announcement of the labeling requirement, even before the release of the Order. Amazon.com, at least, had been a part of those April discussions with the FCC and presumably understood the intent of their action.

Why were Circuit City, Sears, and Best Buy unwilling to put up the required labels?

Back to CERC's April ex parte meetings with the Commission. In its declared support for the 2006 proposed legislative timeframe for labeling compliance, CERC presumably was asking for the same terms. S.2686 would have required the same label displayed 60 days "after the conclusion of the rulemaking proceeding" that was mandated by the proposed legislation. That rulemaking action was to be complete 60 days after the enactment of the legislation, giving a total of 120 days *formal* notice to the industry.

Is that what they want now?

The new May 25 effective date would give 30 days. The fact that this tentative effective date has been conditioned on OMB approval might suggest that the industry wants more time. 60 days? 120 days?

I don't think anyone actually believes the retail industry needs all of that time to put labels up. Wal-Mart and Amazon.com have proved that is not the case.

CERC has been fighting mandatory labeling for years.

It appears to me that some big box stores ordered bunches of small analog-only TVs in advance of the digital-tuner mandate so that they could keep selling them after March 1. Certainly they've known about the ban for a long, long time and I'm pretty sure they keep track of sales data for those sets.

Putting up consumer alert labels informing potential purchasers of those sets' limitations would of course dissuade those customers from buying them. It seems reasonable they would lobby hard to avoid displaying those labels until an unsuspecting consumer had been found for every analog-only TV left in their stockrooms.

There are several delaying actions available to them. They do not ultimately have to win the argument to prevail. They only have to stall until those analog-only sets have been bought.

I do not believe the FCC spontaneously made a belated decision, on their own, to postpone implementation of the labeling requirement.

Was there a threat of a legal challenge? The Order examined in great detail FCC authority to impose the labeling requirement.

Did the retail lobby seek out friends on the Hill to bring pressure to bear?

When will the Commission inform the public of the real effective date of its labeling requirement?

Why are there no reports of ex parte contacts in this docket?

If the analog-only labeling requirement is delayed, another avenue for consumer education will have been completely lost.

It therefore falls on the broadcast industry to start educating the American public about the impending end of the transition to digital. That means timely public service announcements.

Unfortunately, broadcasters have said their campaign will not start until next year. At a recent Congressional hearing, the broadcasters' representative cited the risk of creating "tremendous confusion" and even "panic" if they started an education campaign before converter boxes became available.

Since when does real education result in confusion?

It brings to mind CEA/CERC's early arguments against warning labels.

The Commission should not follow the same consumer education road as it contemplates its strategy going forward. The American public needs and deserves timely information about the transition. They should not be kept in the dark for yet another year.

TV broadcasters have been given free use of extremely valuable spectrum in exchange for certain public service obligations. A couple of mandatory PSAs every day would cost them little, and would bring light to the American public. But it needs to be done soon.

Please make it so.

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May 4, 2007

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